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No. 88-186

In The
Supreme Court of the United States
October Term, 1988

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THOMAS TEW, as Trustee for ESM Government Securities, Inc., and as Receiver for ESM Group, Inc. and ESM Financial Group, Inc.,

Petitioner,

v.

ARKY, FREED, STEARNS, WATSON, GREER, WEAVER & HARRIS, P.A., & EUGENE E. STEARNS,

Respondents.

—o—

PETITIONER'S REPLY BRIEF

—o—

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PETITIONER'S REPLY BRIEF

Contrary to Respondent's assertions, a conflict in principle exists between the opinion below and this Court's decision in *Nix v. Whiteside,* 475 U.S. 157 (1986). A conflict in principle or approach is reviewable by this Court. *See, e.g., Oregon Department of Fish & Wildlife v. Klamath Indian Tribe,* 473 U.S. 753, 764 (1985); *Barrett v. United States,* 423 U.S. 212, 215 (1976); *Ivan Allen Co. v. United States,* 422 U.S. 617, 623 (1975); *Saxbe v. Washington Post Co.,* 417 U.S. 843, 846 (1974).

The conflict in principle arises from the Courts' differing interpretations of "reasonable professional responses" when an attorney is faced with an ethical dilemma concerning a client's dishonesty. The opinion in *Nix* states that "counsel is precluded from taking steps or in any way assisting the client in . . . violating the law . . . ." 475 U.S. at 166. The orders below condone actions by Arky, Freed that have been expressly prohibited by this Court. The opinion letter issued by Arky, Freed assisted the officers and directors of ESM in perpetuating the widespread fraud that affected a multitude of financial institutions, municipalities and school boards across the nation. The dictates of the *Nix* Court limiting the duty owed by an attorney to his client to "legitimate, lawful conduct," 475 U.S. at 166, was ignored by both the district court and the Eleventh Circuit Court of Appeals.

Furthermore, in rendering its orders, the district court relied upon a code of conduct applicable as guidelines to all attorneys in the United States. In granting the motion for summary judgment filed by Arky, Freed, the district court found that the ABA Statement of Policy Regarding

a Lawyer's Response to Auditor's Request for Information [ABA Statement], controls an attorney's responsibility with respect to auditor's inquiries. The erroneous ruling of the district court and the court of appeals arises from the district court's misinterpretation and misapplication of the ABA Statement in determining that the conduct of Arky, Freed and Eugene Stearns was protected by an attorney/client privilege and was not actionable. As the ABA Statement is applicable as guidelines to all attorneys and is not limited to Florida attorneys, the district court's misapplication of the ABA Statement presents questions of national concern. Thus, Respondents' contention that the orders below involve only state law issues is incorrect. The fundamental issue raised by this case—whether an attorney can lie on behalf of the officers and directors of a client to continue a fraud without suffering civil repercussions for his actions—is an issue that should be addressed by this Court for uniformity across the nation.

Respondents also assert that the court of appeals decision could have been based on alternative grounds. However, the court of appeals' ruling consisted of a per curiam affirmance without any indication that grounds other than those expressed by the district court were considered in rendering its opinion. The district court's opinion is totally devoid of any reference to the alternative argument set forth by Respondent in its brief. Thus, Respondent's argument on this point is without merit.

In fact, the conduct of ESM's principals does not bar the trustee/receiver's action on behalf of insolvent corporate entities, because the principals' conduct was ad-

verse to the interests of the ESM corporate entities. When an officer, director, shareholder, agent or employee of a corporation acts adversely or detrimentally to the corporation, his knowledge and actions will not be imputed to the corporation, and thus will not be considered as corporate knowledge or actions. For example, in *Standard Oil Company v. United States,* 307 F.2d 120 (5th Cir. 1962), the court held that corporate agents were acting adversely to the corporation by stealing from it. For this reason, the Fifth Circuit held that their actions should not be imputed to the corporation. Similarly, in *Schacht v. Brown,* 711 F.2d 1343 (7th Cir.), *cert. denied,* 464 U.S. 1002 (1983), the state liquidator of an insurance company brought suit on behalf of the corporation. The defendants challenged the liquidator's standing and capacity to bring the suit, arguing that he was estopped to do so by virtue of the actions of the insurance company's officers and directors in instigating the conduct attacked by the liquidator. The Supreme Court refused to impute the actions of the principals to the corporation, however, because by looting the corporation and artifically prolonging its existence, they had harmed rather than benefited the corporation. *See also In re Investors Funding Corporation of New York Securities Litigation,* 523 F.Supp. 533 (S.D.N.Y. 1980) (bankruptcy trustee's actions not barred by conduct of corporate principals because corporation kept alive by principals after insolvency in order for principals to continue looting corporation).

In this case, the ESM principals kept ESM alive long after the point of insolvency in order to continue their practice of stealing cash from ESM through excessive salaries, improper loans and unwarranted bonuses. Thus,

the principal's conduct was motivated by a desire for personal gain, as well as for the purpose of avoiding detection of their crimes. Since their actions certainly were not beneficial to ESM, their conduct should not be imputed to ESM to bar the trustee/receiver's action against Arky, Freed.

CONCLUSION

For the reasons stated herein and in Petitioner's initial brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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